
The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: “Slavery-like Practice”

Jean Allain



Édition électronique

URL : <http://journals.openedition.org/crdf/5236>

DOI : 10.4000/crdf.5236

ISSN : 2264-1246

Éditeur

Presses universitaires de Caen

Édition imprimée

Date de publication : 1 novembre 2012

Pagination : 27-42

ISSN : 1634-8842

Référence électronique

Jean Allain, « The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: “Slavery-like Practice” », *Cahiers de la recherche sur les droits fondamentaux* [En ligne], 10 | 2012, mis en ligne le 01 décembre 2013, consulté le 09 décembre 2020. URL : <http://journals.openedition.org/crdf/5236> ; DOI : <https://doi.org/10.4000/crdf.5236>

The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: “Slavery-like Practice”

Jean ALLAIN

Professeur de droit international public, Queen’s University, Belfast

Professeur émérite, Centre for Human Rights, Faculty of Law, University of Pretoria

-
- I. 1890-1966 – General International Law
 - A. The Slave Trade
 - B. Slavery
 - C. Servitude
 - II. 1966-1998 – Human Rights Law and “Slavery-like Practices”
 - A. The Slavery-like Practice of Apartheid
 - B. Apartheid Unbridled from the Notion of “Slavery-like Practice”
 - C. “Slavery-like Practice” Unbridled from Apartheid
 - III. 1998-present – International Criminal Law
 - A. The Trafficking Instruments
 - B. Enslavement and the International Criminal Court

Conceptually, focusing on slavery writ large – or better: human exploitation – in three distinct eras provides one with a better understanding of the manner in which the overall legal regime has evolved internationally and the way in which the introduction of the term of art “slavery-like practice” has obfuscated the law. This term, introduced in 1966 as a means of viscerally denouncing apartheid, quickly became synonymous, within the United Nations human rights system, with social evils as diverse as incest and female genital mutilation. “Slavery-like practice” muddled the waters as its use confused the political with the legal not only where “slavery” as defined by the 1926 Slavery Convention was concerned, but more so with the nomenclature of “practices similar to slavery”, those conventional servitudes noted in the 1956 Supplementary Convention. In so doing, the use of the term “slavery-

like practice” effectively grinded to a halt any evolution which might have transpired with regard to the law of human exploitation. It was only at the start of the twenty-first century, with the enumeration of types of exploitation within the trafficking conventions and the coming into force of the Rome Statute of the International Criminal Court which criminalised enslavement, that the law of human exploitation emerged from the shadows of the term “slavery-like practice” to become relevant once more.

This study considers the three eras of the abolition of slavery and human exploitation: i) 1890-1966 – the slave trade, slavery, and servitude in general international law; ii) 1966-1998 – “slavery-like practices” and human rights law; and iii) 1998-present – enslavement and international criminal law. More so, the study focuses on the second era, from 1966 to 1998, to demonstrate how the United

Nations turned from dealing with issues of slavery and human exploitation within a legal paradigm to ridding its legal content and equating the notion of “slavery-like practice” with any perceived social evil which the United Nations’ Charter-based system sought to address. The era of “slavery-like practices”, which is now behind us and should be consigned to the dustbin of history, obfuscated international law and demonstrated a fundamental weakness of the United Nations human rights system which, within the multilateral, Charter-based system, is at its very core political. It is only with the recent criminalisation of slavery and human exploitation at the international level – manifest in the trafficking conventions and the Statute of the International Criminal Court – where it bumps up against the countervailing right of accused to know the charges against them that the law related to slavery and human exploitation re-emerges as a viable instrument for holding perpetrators accountable and by extension seeking to protecting individuals from nefarious exploitation.

I. 1890-1966 – General International Law

A. The Slave Trade

The move to address slavery and human exploitation at the international level was first given voice by a declaration at the Congress of Vienna in 1815. Settling the Napoleonic Wars, the European Powers expressed their wish to “bring to an end a scourge which has for a long time desolated Africa, degraded Europe, and afflicted humanity”. In so doing, they declared that they:

[...] consider the universal abolition of the trade in Negroes to be particularly worthy of their attention, being in conformity with the spirit of the times, and the general principles of our august Sovereigns, who are animated in their sincere desire to work towards the quickest and most effective of measures, by all means at their disposal, and to act, in the

use of those means with all zealousness and perseverance which is required of such a grand and beautiful cause¹.

Despite attempts throughout the era of the Concert of Europe to get agreement on a legal text outlawing the slave trade at sea, this was not to be, as a number of maritime powers hesitated in the wake of British dominance of the seas and its zealousness in seeking to outlaw the slave trade by establishing a right to visit ships at sea at variance with established law as rooted in the Grotian notion of the freedom of the seas².

As a result, the United Kingdom turned to building a bilateral network of treaties to suppress the slave trade at sea which ultimately consisted of thirty-one States³. In the main, these treaties provided for a mutual right to visit the other flag State’s ships on suspicion of involvement in the slave trade, and to the forfeiture by specifically constituted bilateral courts – so-called mixed commissions – of any vessel found to be shipping slaves or having onboard equipment specific to the carrying of slaves⁴. It has been estimated that the various mixed commissions situated on both sides of the Atlantic Ocean were “responsible for the condemnation of over 620 slave vessels and the liberation of nearly 80,000 slaves”⁵. By the mid-1860s, the United Kingdom achieved bilaterally what it failed to procure multilaterally: the legal abolition of the slave trade at sea. Universal abolition was given formal recognition by the 1890 General Act of the Brussels Conference which established a maritime zone off the East Coast of Africa wherein European States were granted a limited right to visit so as to suppress the slave trade where it continued to persist⁶.

Susan Miers notes that the Brussels Conference “focused attention on the slavery issue and helped to rally support to the imperialist cause”, which was manifest in the scramble by European Powers to appropriate territory on the Africa continent⁷. With this came the move to abolish the slave trade on land and the gradual suppression of the slave trade in Africa. As a result of the First World War and the Treaty of Versailles seeing

1. *Declaration des 8 Cours, relative à l’abolition universelle de la traite des nègres*, 8 February 1815, in *British and Foreign State Papers*, vol. 3 (1815-1816), London, James Ridgway, 1838, p. 972. The eight Powers were Austria, Britain, France, Prussia, Russia, Portugal, Spain and Sweden.
2. See J. Allain, “Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade”, *British Yearbook of International Law* 2007, vol. 78, 2008, p. 342-388.
3. These thirty-one States included, in chronological order of signature: Portugal, Denmark, France, Spain, Netherlands, Sweden, Buenos Aires, Colombia, Brazil, Mexico, Confederation of Peru, Bolivia, Hanseatic Cities, Tuscany, the two Sicilies, Chile, Venezuela, Uruguay, Haiti, Texas, Austria, Prussia, Russia, The United States of America, Equator, Muscat, Arabs of the Gulf, New Granada, Zanzibar, Egypt. See R. Phillimore, *Commentaries upon International Law*, London, Butterworths, 1879, p. 420-421.
4. Such equipment included open gratings on hatches, spare planks for the creation of a slave-deck, possession of shackles or an overabundance of water and food for needs of the crew on the planned voyage. For an example of an “equipment clause”, see *Further Additional Article to the Treaty of 1822 between Great Britain and The Netherlands, for the Prevention of the Traffic in Slaves*, 25 January 1823, in *British and Foreign State Papers*, vol. 10 (1822-1823), London, James Ridgway, 1850, p. 559. For reference to mixed commissions, see L. Bethell, “The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century”, *Journal of African History*, vol. 7, 1966, p. 87.
5. J.-P. van Niekerk, “British, Portuguese, and American judges in Adderley Street: the International Legal Background to, and some Judicial Aspects of, the Cape Town Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century (Part 2)”, *The Comparative and International Journal of Southern Africa*, vol. 37(2), 2004, p. 200.
6. See General Act of the Brussels Conference relative to the African Slave Trade, 2 July 1890, in Sir E. Hertslet, *The Map of Africa by Treaty*, London, Cass, 1967, vol. 2, p. 499.
7. S. Miers, *Britain and the Ending of the Slave Trade*, New York, Africana Publishing Corporation, 1975, p. 294. For the “Scramble for Africa”, see H. Wesseling, *Divide and Rule: The Partition of Africa 1880-1914*, Westport, Praeger, 1996.

Germany lose its African colonies, Belgium, France and the United Kingdom sought the abrogation of the 1890 General Act which, beyond the suppression of the slave trade, allowed for commercial access to Africa for all. By way of a treaty signed at Saint-Germain-en-Laye in 1919, the colonial powers effectively reduced the 65 articles of the General Act to the following provision:

The Signatory Powers exercising sovereign rights or authority in African territories will continue to watch over the preservation of the native populations and to supervise the improvement of the conditions of their moral and material well-being. They will, in particular, endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea⁸.

As the provision indicates, by the early part of the twentieth-century, State focus had also come to include slavery.

B. Slavery

The issue of slavery was first considered by the League of Nations in 1922, when a general resolution was passed by the Assembly which “was intended to disarm suspicions that it was an attack” on Ethiopia, a non-member State of the League which had successfully fought off the Italian colonialism at Adwa in 1893⁹. With the admission of Ethiopia to the League of Nations the following year, focus of League turned to the promotion of an international legal instrument meant to suppress both slavery and the slave trade. In 1924, the Council of the League of Nations created the Temporary Slavery Commission, a body of experts whose work constitutes the intellectual DNA of much of what is found not only in the Slavery Convention negotiated and established in 1926, but also the 1956 Supplementary Convention established by the United Nations.

While the signatories to the Saint-Germain-en-Laye Convention had endeavoured to “secure the complete suppression of slavery [...] and of the slave trade”, the States negotiating the 1926 Slavery Convention were not willing to go so far where slavery was concerned. By way of Article 2 of the 1926 Slavery Convention, States Parties agreed to “suppress and prevent the slave trade”, but did not seek to give immediate effect to like obligations with regard to slavery, as they pledged to “bring about, progressively and as soon as possible, the complete abolition of

slavery in all its forms”¹⁰. The Convention, recognising that forced labour could develop into conditions analogous to slavery, allowed it to persist for public purposes but sought, though “progressively and as soon as possible”, to put an end to the practice. While States Parties committed to undertaking negotiations with the look to once more establishing a general treaty to suppress the slave trade at sea, this provision was still-born as no such instrument ever materialised. Where the slave trade was concerned, however, the States Parties undertook, at Article 3, to:

[...] adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.

While it can be said that, *lex posterior legi priori derogate*, the obligation flowing from the 1926 Slavery Convention have been superseded by provisions of contemporary international human rights law, what remains are the normative definitions of slavery and the slave trade as set out in Article 1 of the 1926 Slavery Convention:

1. Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
2. The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

As was noted in the Judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the 2002 *Kunarac et als.* case:

The customary international law status of these substantive provisions is evinced by the almost universal acceptance of that Convention and the central role that the definition of slavery in particular has come to play in subsequent international law developments in this field¹¹.

While the definition of the slave trade has remained uncontested, the definition of “slavery” has been interpreted in at least three ways. The European Court of Human Rights, in its 2005 *Siliadin* judgment, considered the definition of slavery in very narrow terms, as applying exclusively in situations of chattel slavery, where a person has *de jure* ownership over another¹². The Court states:

8. *Convention Revising the General Act of Berlin, 26 February 1885, and the General Act and Declaration of Brussels, 2 July 1890, 10 September 1919, Article 11, § 1.*
9. S. Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem*, Walnut Creek, AltaMira Press, 2003, p. 73. See also J. Allain, “Slavery and the League of Nations: Ethiopia as a Civilised Nation”, *Journal of the History of International Law*, vol. 8, 2006, p. 213-244.
10. League of Nations, Slavery Convention, Geneva, 25 September 1926, Doc. C.586.M.223.1926.VI, Publications of the League of Nations, 16 October 1926, VI.B. Slavery. 1926.VI.B.7, Article 2; as reproduced in J. Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Leiden – Boston, Martinus Nijhoff Publishers, 2008, p. 754.
11. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac, Kovac & Vukovic*, Case n° IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, § 520.
12. See European Court of Human Rights, *Siliadin v. France*, Application 73316/01, 26 July 2005, p. 37.

[...] this definition corresponds to the “classic” meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object”.

The second interpretation of the term “slavery”, as set out in the 1926 Slavery Convention, was put forward by David Weissbrodt, then Member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, in conjunction with Anti-Slavery International. In their 2000 Report on Contemporary Forms of Slavery the authors contend that slavery as defined in the 1926 Slavery Convention goes beyond the written word to also include lesser servitude mentioned by the 1924 Temporary Slavery Commission:

By referring to “any or all of the powers of ownership” in its definition of slavery, and setting forth as its stated purpose the “abolition of slavery in all its forms” the Slavery Convention covered not only domestic slavery but also the other forms of slavery listed in the Report of the Temporary Slavery Commission¹³.

This interpretation, however, cannot be sustained. It is clear that States, in negotiating the content of the 1926 Convention, did *not* intend to widen the scope of “slavery” by subsuming within the definition lesser servitudes which did not meet the threshold of the “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. The *travaux préparatoires* bear this out, as the Union of South Africa, in commenting on the 1925 League of Nations Draft Convention, noted that the “Convention as drafted goes somewhat further than seems necessary for the abolition of slavery and the slave trade”. Where an early draft of the Convention introduced the concept of “domestic slavery and similar conditions” beside slavery, the Union of South Africa protested saying that either a person was a slave as defined by the proposed Convention or they were not:

If, [...], they have become domestic slaves or persons in similar conditions in the manner indicated, that can only

be because others have acquired a right of property in them, and they are therefore slaves as defined in Article 1¹⁴.

When the 1926 Slavery Convention was presented to the Assembly of the League of Nations for signature, the Report which accompanies it recognised, though hesitantly, that “these last practices do not come under the definition of slavery as it is given in Article 1”¹⁵. As a result, the provision “domestic slavery and similar conditions” had been deleted from the final provisions of the 1926 Slavery Convention.

The third interpretation of the definition of slavery¹⁶ flows from the *travaux préparatoires*, and has been expressed in part by the High Court of Australia in the 2008 *The Queen v Tang* case wherein it was determined that the definition applies to both *de jure* and *de facto* slavery¹⁷. The High Court looked to the wording to the first element of the definition of slavery – the phrase “status or condition” – to make the *de jure* / *de facto* distinction: status, it noted, “is a legal concept”, while “the evident purpose of the reference to ‘condition’ was to cover slavery *de facto* [...]”¹⁸. The High Court then made clear that the definition, unlike the European Court of Human Rights’ interpretation, did not turn on the “exercised a genuine right of legal ownership”, but instead that the “definition turns upon the exercise of power over a person”; and that in *de facto* conditions the “definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible”¹⁹. In other words, one could conceive of a *de jure* right of ownership over a person, but also the exercise of the powers which would otherwise be attached to a right of ownership in situations of *de facto* slavery.

In giving content to the scope of the definition of slavery, the High Court makes reference to a 1953 Report, in which the United Nations Secretary-General provides a reading of “powers attaching to the right of ownership”. The Secretary-General puts forward the following characteristics of such powers attaching to the right of ownership: the ability to purchase or transfer a person; the absolute use of a person, their labour or the ownership of the product of that labour; as well as the indeterminacy or the inheritability of the status or condition of a person held in slavery²⁰.

13. See UN Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery*, working paper prepared by D. Weissbrodt and Anti-Slavery International, UN Doc. E/CN.4/Sub.2/2000/3, 26 May 2000, p. 5. Emphasis in the original.

14. League of Nations, *Draft Convention on Slavery, Replies of Governments, Reply from the Government of the Union of South Africa*, Doc. A.10(a).1926.VI, 22 July 1926, Publications of the League of Nations, VI.B. Slavery. 1926.VI.B.3, p. 5.

15. League of Nations, *Slavery Convention: Report presented to the Assembly by the Sixth Committee*, Doc. A.104.1926.VI, 24 September 1926, Publications of the League of Nations, VI.B. Slavery. 1926.VI.B.5, p. 1-2.

16. See J. Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, vol. 52, 2009, p. 239-275.

17. See *The Queen v Tang* [2008], HCA 39, 28 August 2008; see also J. Allain, “The Queen v. Tang: Clarifying the Definition of ‘Slavery’ in International Law”, *Melbourne Journal of International Law*, vol. 10, 2009, p. 246-257.

18. *The Queen v Tang* [2008], HCA 39, 28 August 2008, p. 12.

19. *Ibid.*

20. UN Economic and Social Council, *Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude*, UN Doc. E/2357, 27 January 1953, p. 28, n. 1. As noted in this report the six powers attaching to the right of ownership read: “1. the individual of servile status may be made the object of a purchase; 2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law; 3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour; 4. the ownership of the

C. Servitude

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights which notes at Article 4 that “No one shall be held in slavery or servitude”²¹. One year later, the General Assembly requested that the Economic and Social Council consider the issue of slavery and, by 1953, requested the UN Secretary-General canvas all States, both members and non-members of the United Nations, “concerning the desirability of a supplementary convention and its possible contents”²². Within this process, the United Kingdom put forward a Draft Supplementary Convention on Slavery and *Servitude* as a basis of negotiation. That title of the Convention would give way by the time it was accepted by the Diplomatic Conference of 1956 so as to read: the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and *Institutions and Practices Similar to Slavery*²³. This shift from considering issues of “servitude” to issues of “institutions and practices similar to slavery” was one brought on by the unwillingness by States negotiating the Convention to accept immediate obligations to suppress servitude. Instead, the States Parties negotiating the 1956 Supplementary Convention agreed, like in 1926, that they would “take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment” of these institutions and practices²⁴.

Despite this, throughout the whole negotiation process and stretching back as far as the 1924 Temporary Slavery Commission, the four institutions and practices enumerated in Article 1 were considered “servitudes”. These four conventional servitudes, re-branded as “institutions or practices similar to slavery” are defined in Article 1 in the following terms:

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

The four institutions and practices similar to slavery are in essence (ie: normatively) conventional servitudes. If one considers the evolution of international human rights law which established, under Article 8(2) of the International Covenant on Civil and Political Rights, that: “No one shall be held in servitude”; it can be argued that nomenclature of “institutions and practices similar to slavery” can be dropped in favour of recognising these as types of servitudes. To maintain that the obligation of the 1956 Supplementary Convention to move “progressively and as soon as possible” towards “the complete abolition or abandonment” of the four institutions and practices similar to slavery some fifty years after the coming into existence of the 1956 Supplementary Convention and the evolution of human rights law seems dubious at best; and thus, the original understanding of these practices as types of servitude should revert to kind²⁵.

Beyond the nature of these four institutions and practices similar to slavery, it should be noted that the 1956 Supplementary Convention creates for States Parties specific obligations, of which the criminalisation of dependency on slavery or attempt to, accessory to, conspiracy to enslave or to participate in the slave trade; with such criminalisation for institutions or practices similar to slavery required to take place progressively and as soon as possible. Where servile marriage was concerned, Article 2 requires that States Parties “undertake to prescribe, where appropriate, a suitable minimum age of marriage” and to set out State control over the institutions. Further provisions are also found within the Convention regarding the slave trade, wherein States Parties are required to suppress the conveying of slaves by via ports, the coast or via airfields. While these obligations remain live for States Parties, it may be said that, like the 1926 Slavery

individual of servile status can be transferred to another person; 5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it; 6. the servile status is transmitted *ipso facto* to descendants of the individual having such status”. See J. Allain, “The Definition of Slavery in International Law”, p. 262-266.

21. UN General Assembly, Resolution 217 A (III), 10 December 1948.

22. See UN General Assembly, Resolution 278 (III), 13 May 1949; and United Nations, Economic and Social Council, Resolution 475 (XV), 27 April 1953.

23. United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Final Act and Supplementary Convention, UN Doc. E/CONF.24/23, 4 September 1956.

24. *Ibid.*, Article 1.

25. See J. Allain, “On the Curious Disappearance of Human Servitude from General International Law”, *Journal of the History of International Law*, vol. 11, 2009, p. 303-332.

Convention, the most relevant product of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery is its definitions.

II. 1966-1998 – Human Rights Law and “Slavery-like Practices”

In the aftermath of the negotiation of the 1956 Supplementary Convention, monumental changes took place in international relations. For the first ten years of existence of the United Nations, membership was limited by the inability, within the context of the Cold War, of the Soviet Union and the United States of America to agree on a formula which would allow States, beyond the declared allies of the victors of the Second World War, to accede to the Organisation. In 1955, the log-jam of potential members was resolved, and membership in the United Nations has grown from its original forty-nine to its current one hundred and ninety-two member States. The bulk of the new membership resulted from the decolonisation process which ultimately shifted the balance of power from the North to the South within the democratic bodies of the United Nations. This was very much in evidence, where the issue of slavery and human exploitation was concerned, as the legal regime just considered – manifest in the 1926 Slavery Convention and the 1956 Supplementary Convention – would take a backseat for nearly half a century to the political concept of “slavery-like practices”. By turning to “slavery-like practices”, newly-independent States were given a platform to criticise colonialism, but more so, as a further means of challenging apartheid; while deflecting attention away from “entrenched customs”, such as child marriage and widow inheritance which, as Suzanne Miers writes, “they did not consider forms of servitude”²⁶.

A. The Slavery-like Practice of Apartheid

In the direct aftermath of the establishment of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, no sense of urgency existed within the United Nations to address issues of human exploitation writ large. On an annual basis from 1960 to 1962, the United Nations Economic and Social Council did little more than pass resolutions urging States to adhere to the 1926 and 1956 Conventions²⁷. But by 1963, the Council considered that “there exists a need for accurate, comprehensive

and up-to-date information of the extent of slavery, the slave trade and institutions and practices similar to slavery still persist today”. As such, it requested the UN Secretary-General to appoint a special rapporteur²⁸, who would bring up to date a study which had been carried out in 1955 by Hans Engen on the extent to which slavery, the slave trade and servitude persisted²⁹. The new Special Rapporteur on Slavery, Mohamed Awad, presented his Report in 1966. In that Report, the link between slavery and apartheid was made for the first time as a result of a submission by the Union of Soviet Socialist Republics (Soviet Union) wherein it considered the lack of adherence to the 1956 Supplementary Convention as being “abnormal”; and stated that the “main factors upholding and encouraging slavery at the present time are colonialism, *apartheid* and racism”³⁰. This wording was reproduced by Awad in the section of his Report related to “suggestions for possible action by the United Nations in the field of slavery”³¹.

During consideration of Mohamed Awad’s *Report on Slavery*, the Social Committee of the UN Economic and Social Council was drawn to the section dealing with suggestions for possible UN action. It was during these – rather contentious – deliberations that the term of art “slavery-like practice” emerged as the focal point of the drafting of a resolution which would later be forwarded to the Economic and Social Council and later still, on 26 July 1966, pass as Resolution 1126 (XLI). It was the Representative of the Soviet Union who, while thanking Awad for his work, noted that:

[...] slavery was not limited exclusively to the facts mentioned in the report. Apartheid and certain forms of colonial exploitation still found in South Africa and in territories administered by Portugal constituted perhaps one of the most insidious forms of slavery with which the United Nations had to contend³².

While it was the Soviet Union that first put forward the claim, it was the Representative of the United Republic of Tanzania, Waldo Waldron-Ramsey, who took the lead in advocating the link between slavery and apartheid and colonialism throughout the discussion of the Social Committee and was the intellectual engine behind the concept of “slavery-like practice”. For Waldron-Ramsey, one had to start with the definition of “slavery”. In his view:

[...] the policy of apartheid followed by South Africa in its own territory and in South West Africa, by the racist, traitorous and illegal regime in the Colony of Rhodesia and the colonialist methods applied by the Portuguese Government in the so-called Portuguese territories of

26. S. Miers, *Slavery in the Twentieth Century*..., p. 362.

27. UN, *United Nations Action in the Field of Human Rights*, UN Doc. ST/HR/2/Rev.4, 1994, p. 77.

28. UN Economic and Social Council, Resolution 960 (XXXVI), 12 July 1963.

29. See UN Economic and Social Council, *Report of the Rapporteur appointed under Council Resolution 525 A (XVII)*, UN Doc. E/2673, 9 February 1955.

30. UN, Mohamed Awad, *Report on Slavery*, UN Doc. E/4168/Rev.1, 1966, p. 285. Emphasis in the original.

31. *Ibid.*, p. 303.

32. UN Economic and Social Council, Social Committee, *Summary Record of the Five Hundred and Thirty-Fourth Meeting*, 6 July 1966, UN Doc. E/AC.7/SR.534, 13 December 1966, p. 11.

Mozambique, Angola, and Portuguese Guinea, were flagrant examples of slavery.

It was manifest that the methods traditionally used by the colonialist must be regarded as practices similar to slavery³³.

Waldron-Ramsey disagreed with Mohamed Awad's proposal that a committee of experts be established to consider issues of slavery, "unless the endeavour was first made to widen the actual definition of slavery"³⁴.

The Chair of the Social Committee, seeing that a number of delegates wished to go beyond considering the *Report on Slavery* by putting forward specific proposals for dealing with slavery, called for the establishment of a working group to seek agreement on a draft resolution³⁵. When the Working Group reported back to the Social Committee, it was clear that agreement could not be reached on the contentious issues of apartheid and colonialism which were being equated to "practices similar to slavery" – that is, in line with the wording of the 1956 Supplementary Convention. As the note accompanying the Draft Resolution put forward by the Working Group stated, the "texts on which members of the Working Group were not in agreement are indicated by the use of square brackets". Of these, the third and seventh preambular paragraphs, as well as paragraph four of the Working Group's Draft Resolution provided a choice between the phrase "slavery, the slave trade and institutions and practice similar to slavery" or "slavery, the slave trade and all institutions of *apartheid* and colonialism which form part of the practice of slavery". Further disagreement was manifest in the Draft Resolution as to what further studies should flow from the Awad's Report. While general agreement existed as to an examination of "the working of laws, regulations and administrative measures" adopted by States to give effect to the 1926 and 1956 Conventions, agreement was not forthcoming to allow for the study of "the practice of apartheid in the Republic of South Africa and the trust territory of South West Africa" or to "study the slave trade and sweated labour which [is obtained] in the Portuguese colonies in Africa"³⁶.

When the Working Group's Draft Resolution was considered by the Social Committee of the Economic and Social Council, the Representative of Greece spoke to the move to develop an expanded definition of slavery as proposed by Waldron-Ramsey:

[...] if it was desired to widen or restrict the definition of slavery as given in those Conventions [read: 1926 Slavery

and 1956 Supplementary Conventions], a new conference of plenipotentiaries should be convened. That was the only proper legal procedure and the procedure advocated by the Tanzanian representative in his draft resolution could not be adopted³⁷.

For his part, Waldron-Ramsey stated that the definition of slavery "should not give rise to any difficulty". He then provided a definition, saying that slavery "obviously meant the domination of one individual or group of individuals by another". He then continued:

What better example of slavery could be found than the situation at present prevailing on the African continent, in South Africa, Rhodesia and the Portuguese colonies of Mozambique, Angola, and Guinea, not to mention the territory of South-West Africa? Any failure to recognise that would clearly be a denial of the classic definition of slavery³⁸.

Waldron-Ramsey did not stop there. Clearly making a political, as opposed to a legal, argument, he stated that he was not going to fathom such "humbug" by States which sought to abide by the legal definition of slavery:

The Committee was not asked to go back to the 1926 or 1956 Conventions, to which the Greek representative had referred, but to deal with slavery in 1966. Some delegations interpreted the notion of slavery in a limited technical sense and were endeavouring to restrict its definition to suit their own ends; he was not fooled by their humbug.

They drew attention to the slavery alleged to exist in India and Pakistan where it was supposed to result from traditional debtor-creditor relationships, or in the High Andes of Peru and Bolivia, where it was said to stem from landlord-tenant relationships. In point of fact there was no slavery either in those Asian countries or in Latin America, but slavery undoubtedly existed in the African countries he had mentioned [re: South Africa, Rhodesia, etc.].

Similarly, it had been claimed that forms of slavery were to be found in certain Islamic customs, particularly polygamy. He protested against such allegations which were designed purely to camouflage other motives. Forms of bondage similar to slavery might be said to exist in certain European and American countries particularly in the Anglo-Saxon countries where prostitution and drug addiction were rife, as he remembered from the time when he had practised as a barrister in London.

Nor could the question of racialism be excluded, for it was the direct corollary of slavery. In his opinion, the classic definition of slavery he had given should either be accepted or extended to include all related manifestations of it without exception³⁹.

33. UN Economic and Social Council, Social Committee, *Summary Record of the Five Hundred and Thirty-Sixth Meeting*, 7 July 1966, UN Doc. E/AC.7/SR.536, 14 December 1966, p. 5.

34. *Ibid.*, p. 6.

35. *Ibid.*, p. 7.

36. UN Economic and Social Council, Social Committee, *Slavery, Draft Resolution by the Working Group established by the Social Committee at its Five Hundred and Thirty-Sixth Meeting*, UN Doc. E/AC.7/L.486, 8 July 1966, p. 2-3.

37. UN Economic and Social Council, Social Committee, *Summary Record of the Five Hundred and Thirty-Eighth Meeting*, 11 July 1966, UN Doc. E/AC.7/SR.538, 14 December 1966, p. 4.

38. *Ibid.*, p. 4-5.

39. *Ibid.*, p. 5.

Following this discussion of the definition of slavery by the Tanzanian Representative, the Social Committee decided to suspend consideration of the issue of slavery for a day to allow States to try to gain agreement on a draft resolution. No such agreement was forthcoming, however, as a number of texts emerged which, in essence, marked the split within the Working Group, that is: between those who favoured wording that reflected the 1926 Slavery Convention and the 1956 Supplementary Convention and those which sought to include apartheid and colonialism within the terms of slavery⁴⁰.

Speaking in favour of maintaining the wording of the 1926 and 1956 Conventions were the Representatives of the United States of America and France. The Representative of the United States of America stated that:

[...] it seemed to him that a number of delegations represented in the Committee had lost sight of the definition of which the Special Rapporteur [re: Mohamed Awad] had based his study; that definition was, in its turn, based on the definition laid down in the 1926 and 1956 Conventions. He agreed with the representative of Greece that any departure from that definition should be made only after the most careful consideration⁴¹.

The French Representative was rather succinct, simply stating that he “continued to doubt the advisability of the extension of the definition of slavery” contained in the Draft Resolution supported by most delegations⁴².

Not surprisingly, the text which would emerge at the Economic and Social Council was a compromise. That text, sponsored by Algeria, Gabon, Cameroon, Iran, Iraq, Morocco and the United Republic of Tanzania, did not seek to establish the “slavery-like practices of apartheid and colonialism” as a stand-alone item beside slavery and the slave trade, but instead sought to place this phrase under the umbrella of slavery and the slave trade. Thus the Resolution notes in the preamble that “action should be taken to put an end to slavery and the slave trade in all their practices and manifestation including the slavery-like practices and aspects of apartheid and colonialism”. Likewise, in the operative part of the Draft Resolution, Paragraph 5 reads: “*Decides to refer the question of slavery and the slave trade in all their practices and manifesta-*

tions including the slavery-like practices of apartheid and colonialism, to the Commission on Human Rights”⁴³.

The Representative of Gabon stated that proposed draft resolutions which included reference “to apartheid and colonialism had not been made in order to introduce politics into the debate”⁴⁴; and yet, overtly this is what happened when the Representative of Iraq claimed that “some of the institutions and practices referred to in the Convention had disappeared following the accession to independence of the countries in which they had existed, and others would disappear as those countries acquired economic stability”. Little time need be spent on the possibility of debt-bondage, serfdom, servile marriage or child exploitation somehow disappeared as a result of independence, but to say that the claim is certainly doubtful. The Representative of Iraq went on to say that both apartheid and colonialism “had been mentioned at the 1956 Conference, but at that time not enough people had been prepared to press for the inclusion in the Convention of a reference to apartheid and colonialism as being institutions and practices similar to slavery”⁴⁵. However, this claim is unsustainable as an examination of the record of the 1956 United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, shows no consideration of the possible inclusion of apartheid or colonialism as practices or institutions similar to slavery. In fact, apartheid was literally not mentioned at all during the Conference; and discussion of colonialism only emerged in a benign manner as a result of the inclusion at Article 12 of the 1956 Supplementary Convention of a “territorial” or “colonial” clause⁴⁶.

Despite such considerations the phrase “the slavery-like practices of apartheid and colonialism” found its place in the lexicon of the United Nations; and considerations of human exploitation went from being exclusively legal – based on the 1926 Slavery Convention (i.e.: slavery and the slave trade) and the 1956 Supplementary Convention (i.e.: institutions and practices similar to slavery) – to being also considered under the rubrics of a term of art “slavery-like practices”.

The Report of the Social Committee on slavery was forwarded to the Economic and Social Council and considered on 26 July 1966; with the result that Resolution

40. See UN Economic and Social Council, Social Committee, *Slavery: Canada, Panama, Philippines and Sweden: Draft Resolution*, UN Doc. E/AC.7/L.487, 12 July 1966; UN Economic and Social Council, Social Committee, *Slavery, Draft Resolution submitted by Algeria, Gabon, Iraq and the United Republic of Tanzania*, UN Doc. E/AC.7/L.488, 12 July 1966; UN Economic and Social Council, Social Committee, *Slavery, Draft Resolution submitted by Algeria, Gabon, Iraq and the United Republic of Tanzania*, UN Doc. E/AC.7/L.488/Rev.1, 13 July 1966; and UN Economic and Social Council, Social Committee, *Slavery, Algeria, Gabon, Cameroon, Iran, Iraq, Morocco and the United Republic of Tanzania: Draft Resolution*, UN Doc. E/AC.7/L.492, 14 July 1966.

41. UN Economic and Social Council, Social Committee, *Summary Record of the Five Hundred and Forty-First Meeting*, 15 July 1966, UN Doc. E/AC.7/SR.541, 14 December 1966, p. 8.

42. *Ibid.*, p. 10.

43. UN Economic and Social Council, Social Committee, *Slavery: Algeria, Gabon, Cameroon, Iran, Iraq, Morocco and the United Republic of Tanzania: Draft Resolution*. Emphasis in the original.

44. UN Economic and Social Council, Social Committee, *Summary Record of the Five Hundred and Forty-First Meeting*, p. 4.

45. *Ibid.*, p. 6.

46. See J. Allain, *The Slavery Conventions...*, p. 22.

1126 was adopted, declaring that “slavery in all its forms, the trade in persons, *apartheid* and colonialism should be eradicated”⁴⁷. The Economic and Social Committee, for its part, referred “the question of slavery and the slave trade in all their practices and manifestations including the slavery-like practices of *apartheid* and colonialism, to the Commission on Human Rights”⁴⁸. The Commission, following suit, handed the issue over to its Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1967 with the mandate to “undertake regular consideration of the question of slavery in all its forms, including the slavery-like practice of *apartheid* and colonialism”⁴⁹. Also in 1967, in the context of dealing with issues of slavery as it relates to the Commission on the Status of Women, the Economic and Social Council affirmed “that the racist policies of *apartheid* and colonialism constitute slavery-like practices and should be eradicated completely and immediately”. However, it went further, stating that it recognised:

[...] that both the International Slavery Convention of 1926 and the Supplementary Convention of 1956 on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery should be reconsidered in order to embrace the contemporary manifestations of slavery exemplified by *apartheid* and colonialism⁵⁰.

In 1972, the Economic and Social Council sought to draw attention “to the close relationship between the effects of slavery, *apartheid* and colonialism” and directed the Sub-Commission to “examine the possibility of the establishment of some form of permanent machinery to give advice on the elimination of slavery [...]”⁵¹. Yet by the time the Sub-Commission proposed a mechanism to deal with issues of slavery, the die had been cast with regard to any legal link between *apartheid* and slavery. It should be noted that from this time forward the notion of the slavery-like practice of colonialism never gained any true independent footing, instead when “slavery-like practice” was mentioned it was primarily in conjunction with *apartheid*⁵².

The association of *apartheid* with slavery through the term “slavery-like practice” would fail to find legal footing. In fact, when States moved, in 1973, to establish a convention to suppress and punish *apartheid*, even in its earliest

draft form, the proposed instrument failed to make this connection⁵³. The lack of inclusion of such a provision was made more evident by the fact that the original draft was developed in tandem between Guinea and the Union of Soviet Socialist Republics, the latter having been the very same State which had put forward the original proposition that *apartheid* was an “insidious form of slavery”. The nearest that original draft came to making a link between slavery and *apartheid* was the crime of *apartheid* which was deemed to be “committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and of systematically oppressing them” by, *inter alia*, the “[e]xploitation of labour of the members of an oppressed racial group”⁵⁴. That provision was later modified at the prompting of wording put forward by Nigeria, Pakistan and the United Republic of Tanzania, which sought to bring into the equation forced labour. As a result, the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* established, amongst the instances of the crime of *apartheid*, the following: “Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour”⁵⁵.

B. *Apartheid* Unbridled from the Notion of “Slavery-like Practice”

One year later, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended through the Commission of Human Rights, and the Economic and Social Council accepted, the establishment of a five-person Working Group on Slavery, comprised of members of the Sub-Commission. It was here, within the Working Group on Slavery (and its later incarnation as the Working Group on Contemporary Forms of Slavery), that the legal regime of slavery and human exploitation gave way to the political; wherein the Working Group, at its very first session in 1975, made plain that it was not going to be bound by the definition of slavery established by the 1926 Slavery Convention (which, it should be added, is reiterated and confirmed in the 1956 Supplementary

47. See UN Economic and Social Council, *Slavery: Report of the Social Committee*, UN Doc. E/4244, 19 July 1966, p. 3. For the discussion and vote, see UN Economic and Social Council, *Official Record*, 41st Session, 5 July – 5 August 1996, 1439th Meeting, UN Doc. E/1996/96, 26 July 1996, p. 154.

48. UN Economic and Social Council, Resolution 1126 (XLI), 26 July 1966.

49. UN Commission on Human Rights, Resolution 13 (XXII), 21 March 1967.

50. UN Economic and Social Council, Resolution 1232 (XLI), 6 June 1967.

51. UN Economic and Social Council, Resolution 1695 (LII), 2 June 1972.

52. The most substantive consideration of the slavery-like practice of colonialism is found in: UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-Like Practices of Apartheid and Colonialism*, Report submitted by the Special Rapporteur Mr. Mohamed Awad, 16 July 1971, UN Doc. E/CN.4/Sub.2/AC.2/332, p. 66-76.

53. See UN General Assembly, *Elimination of All Forms of Racial Discrimination, Draft Convention on the Suppression and Punishment of the Crime of Apartheid*, Note of the Secretary-General, 14 September 1972, UN Doc. A/8768, Annex I, Guinea and Union of Soviet Socialist Republics: *Draft Convention on the Suppression and Punishment of the Crime of Apartheid*.

54. *Ibid.*, Article 2(e).

55. See UN General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, Resolution 3068, 30 November 1973, Article 2(e). Note that as Article 5 of the Slavery Convention makes plain, forced labour can develop “into conditions analogous to slavery” (ie: in situations where any or all of the powers attaching to the right of ownership are exercised).

Convention); instead, while tentatively putting forward two possible broad definitions of slavery, the Working Group was in general agreement “that the definition should be flexible enough to be applicable to any new form of slavery which might emerge in the future and not to limit the scope of investigation of all its possible manifestations”⁵⁶.

With this in mind, the Working Group did not hesitate, despite the silence of the newly established Apartheid Convention, to equate in direct terms apartheid and slavery. “Apartheid”, the Working Group stated, “was considered as the most extended practice of slavery, since the whole population finds itself under the control of a few, through force”. With this as a starting point, some members of the Working Group considered that apartheid and colonialism “were, in themselves, forms of slavery and, therefore the formulation ‘slavery-like practices of apartheid and colonialism’ should be replaced by the formulation ‘the slavery of apartheid and colonialism’”. For other members of the Working Group, slavery was found only in some features of apartheid and colonialism⁵⁷. Where the Working Group was in agreement beyond a link between slavery and apartheid was that there was a lack of information and that an in-depth study of the relationship was necessary.

In its 1976 Report, the Working Group on Slavery, in considering the work of the International Commission of Jurists, agreed that a number of penal sanctions applied to terms and conditions of employment found in Southern Rhodesia’s 1901 Masters and Servants Act were “akin to slavery”⁵⁸. The Working Group on Slavery continued to shift the goalposts this time determining, in 1977, that “apartheid could be considered a collective form of slavery”; it further recommended that apartheid as a collective form of slavery be considered at its next session⁵⁹. In 1978, on the recommendation of the Working Group on Slavery, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the UN Secretary-General to “carry out, as a matter of priority, a study of apartheid and colonialism as collective forms of slavery”⁶⁰. The move from the slavery-like practice to a “collective form of slavery” saw the further obfuscation of the legal with the political.

The Secretary-General, in his 1980 *Apartheid as a Collective Form of Slavery*, sought to rectify the situation, as he noted that this was “the first report prepared for the United Nations which attempts to spell out the various elements of

the apartheid system as a slavery-like practice”⁶¹. In speaking about apartheid, the Secretary-General acknowledged that a general consensus had developed within the international community that apartheid should be understood as “the dispossession and oppression by the white ruling minority of the entire black population for the purpose of exploiting its labour”. Flowing from this general consensus was an attempt to deal with the issue in legal terms:

[...] apartheid and colonialism in southern Africa are therefore practices similar to slavery and forced labour which rely increasingly on indirect compulsion exercised through discriminatory and repressive legislation, but which have developed out of, and co-exist with, historical forms of direct compulsion⁶².

“This definition”, the UN Secretary-General writes,

[...] is clearly broader than the definitions of slavery and slavery-like practices [sic: it should read “institutions and practices similar to slavery”] and of forced labour contained in the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, and the Forced Labour Convention (No. 29) of 1930.

Instead, the Secretary-General notes, this wider definition “emphasizes the indirect nature of the coercion exercised on the black population and its historical roots in colonial conquest and expropriation”⁶³.

In essence, the Secretary-General considers the slavery-like practices of apartheid to be exploitation through indirect or structural forced labour. He writes that the “international consensus which holds that apartheid is a slavery-like practice is supported by a variety of recent historical studies which have analysed the development of apartheid as a system of forced labour based on the dispossession and exploitation of the black people of South Africa”⁶⁴. As the Secretary-General notes, “apartheid as a slavery-like system relies in the first place on the exercise of control over the conditions under which African labour is made available to white employers”⁶⁵. Such control, the Secretary-General reports, includes that of residency (Africans being confined and forced to relocate to “bantustans” or reserved lands, and to settle in single-sex hostels while providing labour in white areas), of movement (pass-cards attached to labour), and of labour (Africans being restricted to low-skilled occupations and through a “colour-bar” to

56. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Slavery on its First Session*, UN Doc. E/CN.4/Sub.2/AC.2/3, 28 August 1975, p. 4.

57. *Ibid.*, p. 5.

58. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Slavery on its Second Session*, UN Doc. E/CN.4/Sub.2/AC.2/373, 19 August 1976, p. 2.

59. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Slavery on its Third Session*, UN Doc. E/CN.4/Sub.2/AC.2/389, 30 August 1977, p. 4 and 6.

60. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Apartheid as a Collective form of Slavery: Report of the Secretary-General*, UN Doc. E/CN.4/Sub.2/449, 18 July 1980, p. 4.

61. *Ibid.*, p. 8.

62. *Ibid.*, p. 5.

63. *Ibid.*

64. *Ibid.*, p. 10.

65. *Ibid.*, p. 18.

advancement in career). As a result of the limited land available for subsistence farming within the bantustans, and the establishment of a head-tax on each African male, this constructed a requirement to provide one's labour; hence through structural elements of the State, collective forced labour was the result of the South African apartheid system.

The Secretary-General concludes his study by saying that apartheid is "not simply a racial discrimination problem", but:

[...] the essence of apartheid lies in the dispossession of the black population through the imposition of quasi-colonial rule, and in the harnessing of the labour of the vanquished indigenous people through a variety of coercive measures for the profit of white investors, both South African and foreign. The international community has therefore described the apartheid system as a slavery-like practice imposed on an entire collectivity, which can be eradicated only through a complete restructuring of the existing political and economic relationships⁶⁶.

For the first and only time, within the United Nations system, the notion of the "slavery-like practice" of apartheid was given specific consideration. The Secretary-General found the link a rather tenuous one, basing himself on the pronouncement of what he termed the "policy-making organs of the United Nations" – in other words, pronouncements of the United Nations' political organs. Within these organs, no clear understanding of the term "slavery-like practice of apartheid" had emerged, instead in considering the various UN reports on apartheid, the Secretary-General sought to show that if there was a slavery-like element to apartheid it lay in a collective, structural, inducement of forced labour on racial grounds.

Having been privy to the interim Report of the Secretary-General in 1979, the Working Group on Slavery determined that the "denial of freedom of residence, movement and employment and the denial of the right to organize in order to change the situation" in South Africa was "the essence of apartheid as a slavery-like practice"⁶⁷.

While the Secretary-General's Report appeared to right things by establishing apartheid as a slavery-like practice, this was undone shortly thereafter. In 1980, the Economic and Social Council decided to appoint Benjamin Whitaker, as Special Rapporteur to update

Mohamed Awad's 1966 *Report on Slavery*. Where apartheid was concerned, Whitaker noted that in general terms that "unjust economic exploitation underlies many of the most serious violations of human rights". He then singled out apartheid, saying that "if a dominant stratum forces others either to work on sub-human terms or to starve, it may be said to be employing a slavery-like practice"⁶⁸. However, Whitaker once more brought into the fold the notion of apartheid as collective slavery by noting first that "apartheid is in the opinion of many people the most oppressive manifestation of slavery that exists in the world today". The continuing:

[...] apartheid and colonialism, in many of their effects, are forms of collective or group slavery that fundamentally oppresses the human rights of several million people. A particular virulent evil of its immorality is that the victims are condemned, involuntarily, to their predicament from the day of their birth and without redress⁶⁹.

In its 1984 Report, the Working Group on Slavery combined the notions of the slavery-like practice of apartheid and the designation of apartheid as collective slavery by recognising awkwardly "that apartheid is the gravest disregard of human dignity and a collective slavery-like practice"⁷⁰. This was followed the next year by a determination by the Working Group that apartheid is the "most evil practice analogous to slavery, which constitutes a crime against humanity"⁷¹. Despite this, the now newly rebranded Working Group on Contemporary Forms of Slavery, in its 1988 Report, sought to infer that it was somehow being consistent in its use of terminology by recommending that "apartheid, including the labour practices under apartheid, should continue to be viewed as a collective form of slavery"⁷². Despite this continued vacillation as to what nomenclature should be used to link slavery with apartheid, such consideration would become moot as events on the ground would quickly overtake those of the UN Human Rights system.

The fall of the Berlin Wall in 1989 marked the start of the implosion of the Soviet Union and the end of the Cold War which in its wake led to the end of apartheid in South Africa. With the freeing of Nelson Mandela in February 1990 after twenty-seven years of imprisonment the road towards the new, apartheid-free South Africa began in earnest. For the Working Group on Contemporary

66. *Ibid.*, p. 59.

67. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-Like Practices of Apartheid and Colonialism, Report of the Working Group on Slavery on its Fifth Session*, UN Doc E/CN.4/Sub.2/AC.2/434, 24 August 1979, p. 9.

68. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Updating of the Report on Slavery Submitted to the Sub-Commission in 1966, Report of Mr. Benjamin Whitaker, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1982/20, 5 July 1982, p. 7.

69. *Ibid.*, p. 11.

70. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-like Practices of Apartheid and Colonialism, Report of the Working Group on Slavery on its Tenth Session*, UN Doc. E/CN.4/Sub.2/1984/25, 21 August 1984, p. 13.

71. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Slavery on its Eleventh Session*, UN Doc. E/CN.4/Sub.2/1985/25, 15 August 1985, p. 11.

72. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-like Practices of Apartheid and Colonialism, Report of the Working Group on Contemporary Forms of Slavery on its Thirteenth Session*, UN Doc. E/CN.4/Sub.2/1988/32, 22 August 1988, p. 24.

Forms of Slavery, a new path beckoned, having been laid out in a recommendation to the Commission on Human Rights that with regard to this “item under the agenda, particular emphasis should be given to the situation of children and of women under apartheid”⁷³. This gave way to a recommendation in 1989 that “under this agenda item more attention should be given in future sessions to the situation of women and children”; that is: dropping the need to consider the issue as linked to apartheid⁷⁴. The following year this recommendation evolved further, speaking of “the situation of vulnerable groups, particularly women and children”⁷⁵. No discussions were held under the agenda heading of “slavery-like practices of apartheid and colonialism” the following year. Despite the fact that the Working Group put forward a recommendation in 1992 to “devote greater attention to ways and means of assisting the victims of apartheid in order to mitigate its consequences”⁷⁶, the line item of the “slavery-like practices of apartheid and colonialism” was removed from the agenda of the Working Group in 1993.

C. “Slavery-like Practice” Unbridled from Apartheid

While apartheid came to be unbridled from the notion of “slavery-like practice” as being, for instance “akin to slavery”, or “collective form of slavery”, etc., the very term “slavery-like practice” also gained an independent existence from its association to apartheid.

This decoupling of “slavery-like practice” from apartheid and its attachment to other types of human exploitation first transpire in the 1982 Report by Benjamin Whitaker in which he introduced new “slavery-like practices” for consideration. Under the heading of “slavery-like practices involving women”, Whitaker examined involuntary marriage and abortion, trafficking in women, exploitation of prostitution, women under apartheid, genital mutilation, sale of women and killing for reasons of dowry. Having extended the term of art beyond its original link to apartheid, the Report confuses the political with the legal, including with types of slavery-like

practices that of servile marriage (ie: in Whitaker’s words “involuntary marriage”) which it covers as an institution or practice similar to slavery found at Article 1(c) of the Supplementary Convention; and the sale of women which would fall within the definition of slavery as set out in the 1926 Slavery Convention.

In 1989, the Working Group on Contemporary Forms of Slavery, sensing that the term “slavery-like practice” and its association with apartheid was to become obsolete, appropriated the term as an agenda item. Rather incredibly it substituted the term “slavery-like practice” for that of “institutions and practices of slavery” as established by the 1956 Supplementary Convention. Under line item 3 of its 1989 Report, the Working Group maintained a heading for five years which read: “Review of Information Received on the Status and the Implementation of Conventions on Slavery and Slavery-like Practices”⁷⁷. This was a monumental shift, as from the first substantive agenda set in 1977 until 1988, the Working Group had an agenda item under the heading of “Review of Developments in the Field of Slavery and the Slave Trade in all their Practices and Manifestations”. This however gave way as the newly renamed Working Group on Contemporary Forms of Slavery, which sought to make the distinction between the legal – by providing a line-item on “slavery and slavery-like practices” meant to consider the 1926 and 1956 Conventions – and a new line-item which included a more encompassing “Review of Developments in other Fields of Contemporary Forms of Slavery”. This category would come to consider, over time: trafficking in persons, exploitation of prostitutes (in 1989); child pornography, children in armed conflict (1990); child soldiers (1991); removal of organs (1992); incest (1993); migrant workers, sex tourism (1994); illegal adoption (1996); early marriages, detained juveniles (1997).

In 2000, David Weissbrodt of the Sub-Commission and the NGO Anti-Slavery International updated the Awad and Whitaker reports. The 2000 Working Paper also conflated, as the Working Group on Contemporary Forms of Slavery had done before it, the term of law “institutions and practices similar to slavery” and the term of art “slavery-like practice”. The Weissbrodt – Anti-Slavery

73. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-like Practices of Apartheid and Colonialism, Report of the Working Group on Contemporary Forms of Slavery on its Thirteenth Session*, UN Doc. E/CN.4/Sub.2/1988/32, 22 August 1988, p. 24.

74. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-like Practices of Apartheid and Colonialism, Report of the Working Group on Contemporary Forms of Slavery on its Fourteenth Session*, UN Doc. E/CN.4/Sub.2/1989/39, 28 August 1989, p. 29.

75. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery, Report of the Working Group on Contemporary Forms of Slavery on its Fifteenth Session*, UN Doc. E/CN.4/Sub.2/1990/44, 23 August 1990, p. 23.

76. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery, Report of the Working Group on Contemporary Forms of Slavery on its Seventeenth Session*, UN Doc. E/CN.4/Sub.2/1992/34, 23 June 1992, p. 26. Note also limited discussion in UN Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery*, p. 22.

77. See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of Slavery and the Slave Trade in all their Practices and Manifestations, including the Slavery-like Practices of Apartheid and Colonialism, Report of the Working Group on Contemporary Forms of Slavery on its Fourteenth Session*, UN Doc. E/CN.4/Sub.2/1989/39, 28 August 1989, p. 1.

International Working Paper stated that “ownership is the common theme existing in all of the conventions concerning the abolition of slavery and slavery-like practices”⁷⁸. As such, the 2000 Working Paper gave “slavery-like practice” an independent meaning from that of apartheid and muddled the waters further by substituting it for the term of law “institutions and practices similar to slavery” as set out in the 1956 Supplementary Conventions.

Here then we see the manner in which a failed attempt in 1966 to have apartheid and colonialism equated to slavery created a new term of art: “slavery-like practice”. That term, over time, not only lost its meaning but its component parts were detached from each other. Apartheid was no longer a slavery-like practice, it became a collective form of slavery among other variations on the theme. Likewise “slavery-like practices” having been decoupled from apartheid came to be conflated with the legal term “institutions and practice similar to slavery”. As a result of the varied and continued loose use of terminology within the United Nations system, the legal terms – “slavery” and “institutions and practices similar to slavery” – lost their meaning, obfuscated within a UN Charter-based human rights regime which is, to its very core, political.

III. 1998-present – International Criminal Law

As the twentieth century drew to a close, the international legal regime regarding slavery and human exploitation excised for all intents and purposes in name only. The 1926 Slavery Convention and the 1956 Supplementary Convention had been surpassed by the UN Charter-based regime’s conflation of “slavery-like practice” with “slavery” and “institutions and practices similar to slavery” so as to render these latter two terms virtually without meaning. That said, the apparent diminution of the legal regime governing slavery and human exploitation has had a reprieve, having been given a new life by the move which manifests itself in the twenty-first century through international criminal law. While the twentieth century saw but one international judgment focused on slavery and human exploitation – the 1905 *Muscat Dhows* case, the twenty-first century has thus far seen decisions by the International Criminal Tribunal for the former Yugoslavia (2002 *Kunarac et als.* case), the European Court of Human Rights (2005 *Siliadin* case), the Economic Community of West African States Community Court of Justice (2008 *Mani v Niger* case); and a consideration by the High Court

of Australia of the definition of slavery in international law (2008 *The Queen v Tang*). This newfound interest in issues of slavery and human exploitation results from recent international agreements which seek to deal with these issues from the perspective of criminal law – with a focus on those who would enslave – as opposed to the human rights regime and its focus on the victim of a human rights abuse.

A. The Trafficking Instruments

This renaissance of legal issues surrounding slavery and human exploitation was given impetus through the 2000 Palermo Protocol to the United Nations Convention against Transnational Organized Crime. That instrument, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, sets out a definition of “trafficking in persons” wherein various types of human exploitation are noted. It might be added here that the 2005 Council of Europe Convention on Action against Trafficking in Human Beings sets out, in the exact same terms, its definition for “trafficking in human beings” as:

[...] the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*⁷⁹.

In essence, the trafficking conventions do not seek to suppress human exploitation *per se* as the conventions deal with the crime of trafficking for the *purposes* of exploitation, the crime being the “recruitment, transportation, transfer, harbouring or receipt of persons” not, for instance, the actual enslavement of a person. What these conventions do, however, is for the most part give voice to the various types of human exploitation which have international instruments attached to them and bring them together for the first time⁸⁰. In a somewhat convoluted manner, the conventions enumerate the most serious types of exploitation as being “at minimum” what constitutes exploitation. This allows for the possibility of lesser or differing types of exploitation to also fall under the definitional element

78. UN Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery*, p. 7. See also paragraph 62 at p. 15 for the same type of conflation.

79. UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, Article 3(a); and Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings, 16.V.2005, Article 4(a). Emphasis added.

80. See 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; 1930 Forced Labour Convention (ILO No. 29); 1926 Slavery Convention; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; 1966 International Covenant on Civil and Political Rights.

of exploitation, forming part of what, in law, constitutes “trafficking in persons”.

The Palermo Protocol is transnational in nature, much like the 1926 Slavery Convention and the 1956 Supplementary Convention, it does not create an international regime, but a transnational one requiring each State Party to act within its jurisdiction. The Protocol requires States to criminalise the conduct established by the definition of trafficking in persons, that is, participating, acting as an accomplice, organising or directing others to trafficking, as well as, where the legal system permits, attempting to commit⁸¹. The Protocol further sets out ways in which States Parties are meant to cooperate with each other while requiring each State to strengthen its respective border controls.

The importance of the trafficking conventions to the regime of slavery and human exploitation is found in the fact that these confirm the relevance of the definitions of slavery and institutions and practices similar to slavery as set out in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. The *travaux préparatoires* of both the Palermo Protocol and the Council of Europe convention indicate that the diplomats negotiating those instruments had the definitions of slavery as set out in the 1926 Slavery Convention and that of institutions and practices similar to slavery as set out in the 1956 Supplementary Convention in mind when they included these terms in the trafficking conventions⁸².

B. Enslavement and the International Criminal Court

If anything, the legacy for international relations of the short Post-Cold War era – that period between the fall of the Berlin Wall in 1989 and the attacks of 11 September 2001 – is the actualisation of a regime of international criminal law. The establishment in 1993 and 1994 of the *ad hoc* criminal tribunals for the former Yugoslavia and for Rwanda followed by hybrid courts and the ultimate negotiation in Rome of the Statute of the International Criminal Court in 1998 mean that the twenty-first century is endowed with a system of international criminal justice

which may prosecute “the most serious crimes of concern to the international community as a whole”⁸³.

Amongst these international crimes is the crime against humanity of enslavement and the crime against humanity and war crime of sexual slavery⁸⁴. As the UN Special Rapporteur, Gay McDougall noted with regard to “sexual slavery”, in her Report on *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, the “term ‘sexual’ is [...] an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery”⁸⁵. While this acknowledgement that sexual slavery describes a type of slavery, the same could not be said to be true, until recently, with regard to the term “enslavement”. Before the coming into existence of the 1998 Statute of the International Criminal Court, the legacy of the Nuremberg trials was such that the International Law Commission considered that:

Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour). Enslavement was included as a crime against humanity in the Charter of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11)⁸⁶.

This understanding, that enslavement included not only slavery but also servitude and forced labour, was acknowledged by the International Criminal Tribunal for the former Yugoslavia in the *Kunarac et als.* case, where the Trial Chamber determined that the definition of enslavement “may be broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law”⁸⁷.

Despite the fact that the law developed by the International Law Commission and the International Criminal

81. See UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, Article 5.

82. See UN, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations Publication Sales No. E.06.V.5, 2006; and Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, 16.V.2005.

83. Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, Article 5.

84. *Ibid.*, Article 7(1)(c) – Crime against humanity of enslavement; Article 7(1)(g) – Crime against humanity of sexual slavery; Article 8(2)(b)(xxii) – War crime of sexual slavery (international conflict); and Article 8(2)(e)(vi) – War crime of sexual slavery (non-international armed conflict).

85. UN Commission on Human Rights, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 30.

86. UN General Assembly, International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, in *Yearbook of the International Law Commission*, UN Doc. A/51/10, 1996, vol. 2, part 2, Article 18, p. 47. Emphasis added.

87. International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.*, 22 February 2001, case n° IT-96-23-T & IT-96-23/1-T, Judgment, p. 193.

Tribunal for the former Yugoslavia seems to indicate that customary international law considered “enslavement” to be distinct from “slavery”, as being an umbrella term which included not only slavery, but also lesser servitudes including forced labour, this understanding has not found its way into the Statute of the International Criminal Court. Instead, the Statute defines enslavement as being synonymous with slavery, that is:

“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children⁸⁸.

Synonymous, as the first part of the definition of enslavement mirrors the definition of slavery established by the 1926 Slavery Convention; while the second part (ie: “and includes the exercise of such power in the course of trafficking in persons, in particular women and children”) does not extend the definition nor modify it, but simply highlights the fact that enslavement within cases of trafficking also fall within the purview of this provision⁸⁹. Thus, on the basis of a treaty, the Statute of the International Criminal Court narrows “enslavement” so as to be, in law, “slavery”; while discarding the perceived customary international law established to date.

That said, it should be acknowledged that the secondary legislation of the International Criminal Court, its *Elements of Crimes*, which are meant to assist “the Court in the interpretation and application” of these crimes, does ultimately mention lesser servitudes⁹⁰. However, the mention of forced labour and lesser servitudes within the *Elements of Crimes* does not – as will be demonstrated – expand the definition of enslavement beyond that of “slavery”. This is so as Article 9(3) of the Statute of the International Criminal Court requires that the “Elements of Crimes [...] be consistent with this Statute”.

Turning to the provisions of the *Elements of Crimes* of the crime of enslavement, Element 1 reads:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

At the end of this Element is the footnote which states:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or

otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children⁹¹.

Prima facie, one might say, via the footnote to Element 1 of the Crime against humanity of enslavement that forced labour and the institutions and practices similar to slavery established by the 1956 Supplementary Convention fall within the definition of enslavement and thus expand that notion beyond slavery to include lesser servitudes. This, however, cannot be as the *Elements of Crimes* must be consistent with the Statute which set the definition of enslavement as mirroring that of slavery as first established by the 1926 Slavery Convention. The manner in which the footnote to Element 1 can be reconciled so as to be consistent with the Statute is to be found through the clause which states that the “deprivation of liberty may, in some circumstances, include” the exacting of forced labour or the reduction of a person via the institutions and practices similar to slavery. Those circumstances would have to be when forced labour or debt bondage, serfdom, servile marriage or child exploitation (i.e.: the institutions and practices similar to slavery) manifest powers attaching to the right of slavery and thus slip their definitional moorings to become also – in law – slavery and, as a result, also meet the definition of enslavement as established by the Statute of the International Criminal Court.

The possibility that forced labour and the institutions and practices similar to slavery can also manifest powers attaching to the right of ownership and thus be considered as slavery as well (and enslavement via the Statute of the International Criminal Court) is foreseen in international law. Article 5 of the 1926 Slavery Convention calls on States Parties to take “all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”⁹². In other words, there was a recognition as far back as 1926 that forced labour could degenerate into slavery; that is: forced labour could manifest “powers attaching to the right of ownership”. Likewise, where the institutions and practices similar to slavery as set out in the 1956 Supplementary Convention are concerned, that instrument expresses in clear terms that these institutions and practices may also constitute slavery as defined by the 1926 Slavery Convention. Article 1 of the Supplementary Convention, while setting out the

88. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, Article 7(2)(c).

89. See *Katanga and Chui* case, International Criminal Court, *Amicus Curiae on Observations related to Sexual Slavery submitted by Queen's University Belfast Human Rights Centre*, ICC-01/04-01/07-1257-Anx, 30 June 2009, § 24. Note that the High Court of Australia has stated that such a formulation as the latter part of the definition of enslavement is “a common drafting technique”: *The Queen v Tang* [2008], HCA 39, 28 August 2008, § 33.

90. See Rome Statute of the International Criminal Court, Article 9(3).

91. *Elements of Crimes*, Article 7(1)(c), Crime against humanity of enslavement, Element 1, ICC-ASP/1/3(part II-B), 9 September 2002. Note that Element 1 of the Crime against humanity of enslavement is reproduced verbatim, including the footnote, as Element 1 common to the Crimes of sexual slavery. See Article 7(1)(g)-2 – Crime against humanity of sexual slavery; Article 8(2)(b)(xxii)-2 – War crime of sexual slavery; and Article 8(2)(e)(vi)-2 – War crime of sexual slavery and the corresponding footnotes 18, 53, and 65.

92. League of Nations, Slavery Convention, Article 5.

four types of servile status (i.e.: debt bondage, serfdom, servile marriage or child exploitation), provides in its introductory paragraph that States Parties “shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of [these] institutions and practices”. The introductory paragraph then continues, stating that the abolition or abandonment of these institutions and practices should take place “where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926”⁹³.

The *Elements of Crimes* are meant to both assist the Court in “the interpretation and application” of the Statute and be consistent with that Statute⁹⁴. By acknowledging that the lesser servitudes noted in the footnote can, *in some circumstances*, manifest powers attaching to the right of ownership, means that forced labour and institutions and practices similar to slavery can manifest the elements required to constitute the crime against humanity of enslavement as set out in the Statute of the International Criminal Court.

Conclusion

The advent of the trafficking conventions and the coming into existence of the International Criminal Court in 2002 provide a reprieve for the legal regime of slavery and

human exploitation which had lost its way as a result of the introduction of the term of art “slavery-like practice” during the latter half of the twentieth century. During the first half of the twentieth century, through the height of the colonial era, States within the early years of both the League of Nations and the United Nations established a legal regime governing both slavery and servitude manifest in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. With the balance of power shifting in the United Nations from 1966 onwards, newly independent States sought – and ultimately failed – to have apartheid recognised as a “practice similar to slavery”. Instead a diplomatic compromise was achieved which labelled apartheid with a term of art, that of “slavery like-practice”. This term ultimately allows for the evolution of the notion of “contemporary forms of slavery” to emerge from the United Nations as an umbrella term utilised to define various social ills. Referral back to the legal only took place at the start of the twenty-first century, with the establishment of a definition of trafficking in human beings and the coming into force of the Statute of the International Criminal Court which established the crime against humanity of enslavement. In reverting back to the legal, within a paradigm of criminal law, the law governing slavery appears to have been given a true lease on life as it has become a viable instrument for holding perpetrators accountable for enslavement and thus offering protection of those enslaved.

93. United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Final Act and Supplementary Convention. Emphasis added.

94. See Rome Statute of the International Criminal Court, Articles 9(1) and 9(3).